

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JEFFERY S. MARTIN,

Plaintiff,

v.

PIERCE COUNTY, et al.,

Defendants.

CASE NO. C20-5709 BHS

ORDER GRANTING IN PART  
AND DENYING IN PART AS  
MOOT DEFENDANTS'  
AMENDED MOTION TO DISMISS

This matter comes before the Court on Defendants NaphCare, Inc., Irina Hughes, NP, and Janel French, LPN's motion to dismiss. Dkt. 17. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion in part and denies it in part as moot for the reasons stated herein.

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

Plaintiff Jeffery Martin alleges that he was denied adequate medical care while detained at the Pierce County Detention and Corrections Center, resulting in severe damage to his eyesight leaving him "effectively blinded." Dkt. 19. He asserts a 42 U.S.C. § 1983 claim for violation of his Eighth Amendment rights and a state law medical

malpractice claim. *Id.* He filed this suit on July 20, 2020. Dkt. 1. On November 30, 2020, Defendants moved to dismiss. Dkt. 17. On December 17, 2020, Martin filed an amended complaint. Dkt. 19. On January 4, 2021, Martin responded to the motion to dismiss. Dkt. 23. On January 8, 2021, Defendants replied. Dkt. 25.

## II. DISCUSSION

Defendants' motion argues that Martin failed to state a claim for violation of his Eight Amendment rights, failed to state a claim for medical malpractice liability, and failed to comply with state medical malpractice claim filing requirements. Dkt. 17 at 2. Defendants concede that Martin's amended complaint moots their motion as to his Eighth Amendment claims. Defendants' motion to dismiss is therefore denied as moot as to Martin's Eighth Amendment claim. However, Defendants argue that the medical malpractice claims still must be dismissed for failure to comply with RCW 7.70A.020. Dkt. 25 at 8.

RCW 7.70A.020(2) provides that "[a] party [in a medical malpractice action] that does not initially elect to submit a dispute to arbitration under this chapter must file a declaration with the court . . . ." "In the case of a claimant, the declaration must be filed at the time of commencing the action and must state that the attorney representing the claimant presented the claimant with a copy of the provisions of this chapter before commencing the action and that the claimant elected not to submit the dispute to arbitration under this chapter." RCW 7.70A.020(2)(a). Defendants argue that failure to comply with RCW 7.70A.020 requires dismissal. Martin does not contest that the

1 statutory language would require dismissal but argues the requirement violates the  
2 Washington State Constitution and should not be enforced.

3       The Washington Supreme Court has previously found two similar medical  
4 malpractice pre-suit filing requirements unconstitutional. In *Putman v. Wenatchee Valley*  
5 *Medical Center, P.S.*, 166 Wn.2d 974 (2009), the Washington Supreme Court considered  
6 RCW 7.70.150's requirement that medical malpractice plaintiffs file a certificate of merit  
7 from a medical expert. It held that the law was unconstitutional because it unduly  
8 burdened the right of access to the courts and violated the separation of powers. *Id.* at  
9 977–78. It reasoned that, under the Washington State Constitution's separation of powers  
10 doctrine, “[s]ome fundamental functions are within the inherent power of the judicial  
11 branch, including the power to promulgate rules for its practice” and found that the  
12 certificate of merit requirement conflicted with Washington Superior Court Civil Rule  
13 (“CR”) 11, providing that attorneys do not have to verify pleadings, and CR 8, which  
14 requires only notice pleading. *Id.* at 980, 983. It concluded that because the requirement  
15 could not be harmonized with court rules and involved procedural matters, the court rules  
16 prevailed. *Id.* at 984–85.

17       In *Waples v. Yi*, 169 Wn.2d 152 (2010) (en banc), the Washington Supreme Court  
18 considered the former RCW 7.70.100(1) (2006)'s requirement that medical malpractice  
19 plaintiffs give health care providers 90 days' notice of their intention to file suit. It  
20 compared CR 3(a)'s instruction that “a civil action is *commenced* by service of a copy of  
21 a summons together with a copy of a complaint, as provided in rule 4 or by filing a  
22 complaint” with RCW 7.70.100(1)'s requirement that no action “may be *commenced*

1 unless the defendant has been given at least ninety days' notice of the intent to commence  
2 the action.” *Waples*, 169 Wn.2d at 160 (emphasis in original). It reasoned that requiring  
3 notice added a step for commencing a suit beyond CR 3(a)’s requirements and failure to  
4 provide notice could result in dismissal of a complaint otherwise properly filed and  
5 served. *Id.* It construed *Putman* as holding that “the addition of legislative requirements  
6 to the court rules for filing suit was unconstitutional.” *Id.* It concluded that the notice  
7 requirement could not be harmonized with CR 3(a), the notice requirement was  
8 procedural, and the court rule thus prevailed. *Id.* at 161.

9       Following *Putman* and *Waples*, Martin argues that RCW 7.70A.020’s requirement  
10 that a complaint be accompanied by an affidavit declining arbitration similarly violates  
11 the separation of powers and conflicts with CR 8 general pleading requirements and  
12 CR 3(a) commencement requirements. Dkt. 23 at 14. Defendants counter that unlike in  
13 *Waples*, the arbitration election requirement does not change the definition of  
14 “commenced,” so it would not conflict with Federal Rule of Civil Procedure 3, providing  
15 that “a civil action is commenced by filing a complaint with the court.” Dkt. 25 at 6.  
16 Martin likely has the better argument that requiring an affidavit to accompany a  
17 complaint conflicts with the Washington Superior Court Civil Rules by adding an  
18 additional, procedural step beyond those contemplated by CR 3(a), the same problem  
19 identified in *Waples*, 169 Wn.2d at 160–61. Dkt. 23 at 15.

1 No court has yet addressed this conflict, and the Court is not aware of authority  
 2 relying on RCW 7.70A.020 to dismiss a claim.<sup>1</sup> The Court is bound to apply the law as it  
 3 believes the Washington Supreme Court would under the circumstances. *See Erie R.R.*  
 4 *Co. v. Tompkins*, 304 U.S. 64, 77–80 (1938). However, the conflict Martin identifies is  
 5 with state law and the Washington Superior Court Civil Rules and with the separation of  
 6 powers between the Washington State legislature and judiciary. As Martin filed this suit  
 7 in federal court and it proceeds under the Federal Rules of Civil Procedure rather than the  
 8 Washington Superior Court Civil Rules, the conflict among Washington’s branches of  
 9 government is not directly presented.

10 Prior to *Putman*’s holding that the certificate of merit requirement was  
 11 unconstitutional, a Court in this District found the requirement did not conflict with the  
 12 Federal Rules and could be enforced in federal court. *Lewis v. The Center for Counseling*  
 13 *& Health Resources*, No. C08-1086 MJP, 2009 WL 2342459, at \*4 (W.D. Wash. Jul. 28,  
 14 2009). Defendants urge the Court to follow this reasoning.

15 When determining whether to apply state law to a claim, the Court first determines  
 16 whether the state law directly conflicts with federal law. *Hanna v. Plumer*, 380 U.S. 460,  
 17 470–74 (1965). *See also* Wright & Miller, 19 *Fed. Prac. & Proc. Juris.* § 4250 (3d ed.)

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 19 <sup>1</sup> Defendants argue that in *Jackson v. Sacred Heart Med. Ctr.*, 153 Wn. App. 498, 500  
 20 (2009), the Court of Appeals reversed a trial court dismissal for failure to comply with both  
 21 RCW 7.70.100 and RCW 7.70A.020, though only RCW 7.70.100 was at issue on appeal. Dkt. 17  
 22 at 9. However, the trial court in fact concluded that failure to comply with RCW 7.70.100 was  
 sufficient so it need not reach failure to comply with RCW 7.70A.020. *Jackson v. Sacred Heart*  
*Med. Ctr.*, No. 07-2-04725-00, 2008 WL 8065287 (Wash. Sup. Ct. Jul. 17, 2008), *rev’d*, 153  
 Wn. App. 498 (2009) (trial court incorrectly applied 2007 version of RCW 7.70.100 rather than  
 2006 version).

(explaining that though the *Erie* doctrine is typically referenced in diversity cases, it also applies in federal question cases when the source of the right lies in state law). In *Lewis*, the Court explained that though federal courts disagreed on the issue, “significant authority suggests that there is no direct conflict between the federal rules and a state law requiring that a certificate of merit be filed in support of a malpractice complaint.” 2009 WL 2342459, at \*2. It reasoned that “the federal rules that govern pleading and the certificate of merit statutes are directed towards different purposes and can ‘exist side by side’ without conflict.” *Id.* at \*3 (quoting *Chamberlain v. Giampapa*, 210 F.3d 154, 160 (3d Cir. 2000)). Though a certificate of merit had to be filed alongside a complaint, the Court reasoned it was not a pleading requirement because its purpose was to prevent litigation of frivolous medical malpractice actions rather than to provide notice of claims and defenses. *Id.* Proceeding through the *Erie* analysis, it concluded that the certificate of merit requirement should be enforced because it could be outcome-determinative, nonenforcement would result in the forum-shopping *Erie* sought to avoid, and no overriding federal interest required application of federal law. *Id.* at \*3–4.

On similar logic, the requirement to file an affidavit declining arbitration in a medical malpractice case does not provide notice of claims or defenses. It would not bear on whether a complaint is considered filed and a suit commenced under Federal Rule of Civil Procedure 3, it could be outcome-determinative, and nonenforcement on the basis of conflict with the Federal Rules could create forum-shopping. And it delineates the bounds of access to relief in the context of a specific, substantive state claim. Thus, both requirements should be enforced under these parameters.

1       Moreover, to avoid an advisory opinion, this question should be decided in a  
2 context where the Washington Superior Court Rules are at issue so that the separation of  
3 powers issue is properly presented. *See also Cohen v. Beneficial Indus. Loan Corp.*, 337  
4 U.S. 541, 547 (1949) (where a state court has made no contrary determination, federal  
5 courts should presume state statutes conform with the state constitution). Therefore, the  
6 Court declines to decide RCW 7.70A.020 is unenforceable as violating Washington's  
7 separation of powers. As Martin failed to comply with a mandatory filing requirement,  
8 his medical malpractice claims are thus barred and Defendants' motion is granted as to  
9 the malpractice claims.

10       Given the harsh result, the serious injury Martin alleges, the lack of prior authority  
11 dismissing claims for failure to comply with RCW 7.70A.020, and the credible analogy  
12 Martin draws to the constitutional infirmity identified in *Waples*, the Court seriously  
13 considered certifying a question to the Washington Supreme Court. Because it appears  
14 that certification would present problems similar to the one the Court identifies here—  
15 asking the Washington Supreme Court for an advisory opinion on interplay with the  
16 Washington Superior Court Civil Rules not presently at issue, or asking it to consider a  
17 conflict with the Federal Rules that the Court concludes is not present—the Court  
18 concludes certification is not warranted. However, “[w]hen an action presents more than  
19 one claim for relief . . . the court may direct entry of a final judgment as to one or more,  
20 but fewer than all, claims or parties only if the court expressly determines there is no just  
21 reason for delay.” Fed. R. Civ. P. 54(b). Therefore, as the Court concludes that there are  
22 substantial grounds for different of opinion on its conclusion and the issue may benefit

1 from final resolution on appeal, the Court will direct entry of final judgment on Martin's  
2 medical malpractice claim.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss, Dkt. 17, is  
5 **GRANTED in part** and **DENIED in part as moot** as stated herein. The Clerk shall  
6 enter JUDGMENT in favor of Defendants on Martin's medical malpractice claims.

7 Dated this 4th day of March, 2021.

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10 BENJAMIN H. SETTLE  
United States District Judge